



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JR CASE NO. 48 OF 2017

AFTRACO LIMITED.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE HON THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

TELKOM KENYA LIMITED.....1ST INTERESTED PARTY

EXCLUSIVE ESTATES LIMITED.....2ND INTERESTED PARTY

RULING

1. On 6/12/2017, the *ex parte* applicant, **AFTRACO LIMITED** brought a chamber summons application dated 6/12/2017 seeking leave of the court to bring a substantive judicial review motion for:

- i. *an order of certiorari quashing Kenya Gazette Notice No. 9534 contained in Kenya Gazette Volume No. CXIX No. 143 dated 29/9/2017;*
- ii. *prohibition orders prohibiting the 1st and 2nd respondents against taking further steps in pursuance and/or furtherance of the said legal notice;*
- iii. *an order of prohibition prohibiting the 1st respondent against holding any proceedings or hearings in pursuance and/or furtherance of the said legal notice; and*
- iv. *an order that the leave so granted do operate as stay of the Gazette Notice.*

2. Through the impugned Gazette Notice, the National Land Commission [the NLC], on behalf of the Ministry of Public Service, Youth and Gender Affairs, gave notice that the Government intends to acquire Land Reference Number 84988/8 registered in the name of Telkom Kenya Limited and measuring appropriately 79 Acres, for the purpose of establishing informal sector '*jua kali*' operations in Nairobi City County. It is contended that a subsequent Gazette Notice was published as a corrigenda capturing the correct Land Reference as LR Number 7656.

3. The *ex parte* applicant contends that the suit property was vested in the 1st interested party, **TELKOM KENYA LIMITED** and that by an agreement for sale dated 5/7/2011, Telkom Kenya Limited agreed to sell the suit property to the *ex parte* applicant at a price of KShs. 1,520,000,000/- and the *ex parte* applicant has been and is still ready, able and willing to complete the purchase. It further contends that

Telkom Kenya Limited has been unable to complete the sale due to a multiplicity of cases filed in respect of the suit property, among them:

- i. *Nairobi HCCC No. 443 of 2011 – Afraco Ltd V Telkom Kenya Ltd & Exclusive Estates Ltd;*
- ii. *Nairobi HCCC No. 1477 of 1995 – Exclusive Estates Ltd V Kenya Posts & Telecommunications Corporation [KPTC] & Postel Housing Co-operative Society;*
- iii. *Nairobi HCCC No. 1158 of 2011 – Exclusive Estates Ltd V Telkom Kenya Ltd & Postel Housing Co-operative Society Ltd;*
- iv. *Nairobi Judicial Review Misc Civil Application No. 69 of 2011 – R V Registrar of Titles & Others ex parte Exclusive Estates Ltd;*
- v. *Court of Appeal Civil Appeal No. 135 Of 2013;*
- vi. *Nairobi HC Civil Application No. 7 of 2017 – Telkom Kenya Ltd V Afraco Ltd & 2 Others; and*
- vii. *Nairobi ELC Petition No. 15 of 2017 – Exclusive Estates Limited & Postel Housing Co-operative Ltd V Telkom Kenya Ltd and Afraco Ltd.*

4. The *ex parte* applicant further contends that parties in the above suits entered into consent to refer their disputes to arbitration and the arbitral proceedings are ongoing before Mr A F Gross and Ms Jackie Janmohammed respectively, and the central issue in the arbitral proceedings is the ownership of the suit property.

5. The gravamen of the *ex parte* applicant is that the action of the National Land Commission has been instigated by Exclusive Estates Limited in a bid to subvert the ongoing arbitral proceedings aimed at determining who the rightful owner of the suit property is. Secondly, the *ex parte* applicant contends that the National Land Commission has acted without jurisdiction and contravened the mandatory provisions of the Constitution and the Land Act 2012.

6. Mr Ochieng Oduol argued the application on behalf of the *ex parte* applicant on 18/12/2017. He submitted that there are pending arbitral proceedings and the dispute before the two arbitral panels revolves around the ownership of the suit property. He further submitted that although the quest to consolidate the arbitral proceedings was rejected by the High Court, there is an appeal seeking to overturn the refusal. Mr Oduol contended that the power of eminent domain is exercisable for public purpose; not for '*jua kali*' operations and not for resettlement of trespassers and encroachers on road reserves. He argued that, in issuing the notice, the National Land Commission is trying to divest jurisdiction from the court and from the court sanctioned arbitral tribunals. He urged the court to grant leave and preserve the suit property through grant of stay.

7. The court allowed the respondents and the interested parties to submit on the law with specific regard to the limb seeking to stay the Gazette Notice. Mr Wahome for the National Land Commission submitted that a corrigenda was published on 6/10/2017 to give the correct Land Reference Number. He added that the state's power of eminent domain is subject only to: [a] public purpose objective and [b] prompt and just compensation. Mr Wahome further submitted that **Section 2 of the Land Act** defines '*public purpose*' to include settlement of squatters, the poor and the internally displaced. He added that the *ex parte* applicant ought to appear before the National Land Commission to raise all its complaints and await a decision before moving to court. He submitted that **Section 115 of the Land Act** provides a mechanism for preserving compensation monies in cases where there is a dispute as to who should be paid the compensation money. He further submitted that private interest should not be allowed to override public interest. He opposed the application for stay.

8. Mr Kamau who represented the Attorney General submitted that the Attorney General is opposed to the prayer for stay. He argued that any compensation monies payable to the owner of the suit property will

be preserved to await determination of the dispute regarding ownership of the suit property. Lastly, he argued that all parties laying claim to the suit property will be given the opportunity to ventilate their concerns before the National Land Commission. Both Mr Mwihuri for Telkom Kenya Limited and Mr Henia for Exclusive Estates Limited supported the position taken by counsel for the National Land Commission and the Attorney General.

9. Grant or refusal of leave is an exercise of judicial discretion. The general test to be applied when exercising this jurisdiction is whether the applicant has made out an arguable case to warrant grant of leave [see ***UWE MEIXNER & ANOTHER V ATTORNEY GENERAL, (2005) eKLR***. The requirement for leave serves to eliminate frivolous, vexatious or hopeless judicial review applications and ensures that only arguable cases proceed for further consideration.

10. I have considered the Chamber Summons dated 6/12/2017 together with all the materials attached to the application. I have also considered the oral submissions made by the parties. I have similarly considered the issues in the application under consideration and the constitutional and statutory framework regulating the operation of the doctrine of eminent domain in Kenya. It does appear that the applicant has legitimate concerns about the probability of the pending arbitral proceedings being rendered nugatory by any award and/or remittance of compensation money while the arbitral proceedings are pending.

11. In my view, **Section 115 of the Land Act 2012** does contemplate a scenario such as the one presented in the present application, where there exists a dispute as to the beneficial ownership of the land to be acquired compulsorily. In such a scenario, the Act provides a clear framework on how the compensation money is to be preserved pending determination of the dispute on who should receive the compensation money. In my view, the forum available to interested parties during the state's exercise of the power of eminent domain is the inquiry contemplated under **Section 112 of the Land Act**.

12. In this regard, the *ex parte* applicant, as an entity claiming an interest in the suit property, is entitled to appear before the National Land Commission, ventilate its claim and urge the Commission to preserve any compensation money awardable. It is also during the inquiry that the interested party will have the opportunity to ventilate its concerns on the legality and constitutionality of the purpose for which the power of eminent domain is being exercised. It is my view that at this point, the application for leave is premature. The *ex parte* applicant should first exhaust the avenue provided under **Sections 112 to 115 of the Land Act**. The doors of this court will remain open to the *ex parte* applicant should it be aggrieved by any decision taken by the National Land Commission within the framework of **Sections 112 to 115 of the Land Act**.

13. For the above reasons, I hold that the application for leave is premature and I decline to grant leave to the *ex parte* applicant at this point. The Chamber Summons dated 6/12/2017 is declined with no order as to costs. In the absence of any other formal request in this matter, the suit herein shall be marked as disposed and the case file shall be closed.

Dated, signed and delivered at Nairobi on this 19th day of December, 2017.

B M EBOSO

JUDGE

In the presence of:

Ochieng Oduol: for the *ex parte* Applicant

Wahome: for the 1st respondent

Kamau: for the 2nd respondent

Mwihuri: for the 1st interested party

Thige: for the 2nd interested party

Halima Abdi: Court Assistant